
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: February 9, 1988
CASE NO. 86-ERA-34

IN THE MATTER OF

MICHAEL D. WILSON,
COMPLAINANT,

v.

BECHTEL CONSTRUCTION, INC.,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Administrative Law Judge (ALJ) Alfred Lindeman submitted a Recommended Decision and Order (R.D. and O.) to the Secretary in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (the ERA or the Act) 42 U.S.C. § 5851 (1982). He recommended that the complaint in this case be dismissed for several alternate, independent reasons. The ALJ held that Complainant's actions just prior to being discharged by Respondent, were not protected activities under the Act. The ALJ also held that Complainant, an electrician/ welder, was not the type of employee protected by the ERA. Finally,

---

the ALJ held that Respondent's stated reason for discharging Complainant was, in fact, the motivating reason for the adverse action, was not applied to Complainant in a disparate manner and was a sufficient business reason for the action. Because I reach the same result as the ALJ, although for different reasons, the complaint in this case will be dismissed.

The facts in this case are well summarized in the ALJ's decision, a copy of which is appended. I cannot agree with the ALJ's conclusion, however, that the ERA protects only quality control inspectors from retaliation for making internal safety complaints. Indeed, I have consistently rejected this conclusion in cases under the ERA (*Nunn v. Duke Power Company*, Case No. 84-ERA-26 (July 30, 1987)) and other statutes with similar employee protection provisions (*e.g., Poulos v. Ambassador Fuel Oil, Inc.*, Case No. 86-CAA-1 (April 26, 1987) and *Willy v. Coastal Corp.*, Case No. 86-CAA-1 (June 4, 1987) (both Clean Air Act, 42 U.S.C. § 7622 (1982)). The reasoning of those cases is equally applicable here. See, *Poulos*, slip opinion at 4-11; *Nunn*, slip opinion, at 10-13.

There is nothing in Section 5851 or its legislative history which draws any distinction between different kinds of employees. The Act says "No employer . . . may discharge *any* employee or otherwise discriminate against *any* employee . . . ." 42 U.S.C. § 5851(a) (emphasis added). Nor is the Ninth Circuit's decision in *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (1984) to the contrary. In concluding that quality control inspectors are protected under the ERA, the *Mackowiak* court did not hold that *only* quality control inspectors are covered. Rather, the Ninth Circuit simply held that "[t]he rationale for the rule [protecting workers from retaliation based on their concerns for safety and quality] is stronger" when a quality control inspector is the complainant. 735 F.2d at 1163. The Ninth Circuit in *Mackowiak* approved the Secretary's reliance on cases such as *Phillips v. Dept. of Interior Board of Mine Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975) for his holding that internal quality and safety complaints are protected. Id. The miner-complainant in *Phillips*, of course, was not a quality control inspector.

Furthermore, the Secretary recently held that employees other than quality control personnel are covered by the employee protection provision of the ERA. *See Nunn v. Duke Power Company*, slip op. at 11. In addition, the Secretary has held implicitly several times that other workers are protected under the ERA. *See Flanagan v. Bechtel Power Corporation*, 81-ERA-7 (June 27,

---

1986); *Smith v. Catalytic, Inc.*, 86-ERA-12 (May 28, 1986); *Priest v. Baldwin Associates*, 84-ERA-30 (June 11, 1986), *Pensyl v. Catalytic, Inc.*, 83-ERA-2 (January 13, 1984).[1] I would note also that the employee protection provision of the Federal Mine Safety and Health Act, 30 U.S.C. § 815(c) (1982), which on its face only covers "miners", has been interpreted to protect a secretary who refused to accede to management's request that she lie to federal investigators, and who was never actually interviewed by them. *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984).

In addition, there is no requirement, as the ALJ seemed to believe, that an employee's safety concerns must be reported to a "project ombudsman" or an HP (health physics) technician to be protected under the ERA. In *Smith v. Catalytic, Inc.*, 86-BRA-12, the employee raised safety concerns with his supervisor, and in *Priest v. Baldwin Associates*,

84-ERA-30, the employee raised his concerns about quality control with union representatives and plant security personnel. Indeed, both a Nuclear Regulatory Commission poster and Respondent's instructions to employees advise them to report safety and quality problems to their supervisors first. CX (Complainant's Exhibit)-C 3 and 5.[2]

The merits of this case are governed by the Secretary's decision in *Pensyl v. Catalytic, Inc.*, Case No. 83-ERA-2 (Jan. 13, 1984). After holding that refusal to work in some circumstances is a protected activity under the Act, the Secretary formulated a general rule for such cases.

> A worker has a right to refuse to work when he has a good faith, reasonable belief that working conditions are unsafe or unhealthful. Whether the belief is reasonable depends on the knowledge available to a reasonable man in the circumstances with the employee's training and experience . . . . Refusal to work loses its protection after the perceived hazard has been investigated by responsible management officials and government inspectors, if appropriate, and, if found safe, adequately explained to the employee.

Id. at 6-7.

The record shows that when Complainant was first informed on January 27, 1986, that he was being assigned to do welding inside the containment building, Complainant expressed concern

---

and requested work in another location. At this point, he was not specific about his concerns. Transcript of hearing (T.) at 372. Because of Complainant's apparent concern, his supervisor, Mr. Elliott, took Complainant on a walk-through of the areas in containment where he would be working. They were accompanied by a Health Physics (HP) technician. T. at 374, 386. Before entering containment for the walk-through, Complainant was shown Radiation Exposure Permit (REP) No. 13075, T. at 373, the REP which covered the work he would be doing, and signed in on it. T. at 379.

An REP sets forth the radiological conditions in the work area to which it applies, and the protective clothing, equipment and procedures which must be followed to perform work under the REP. R.D. and O. at 2. Complainant understood the function of an REP, T. at 271, but did not read it before the walk-through on January 27, 1986. T. at 274. He did sign an REP Sign-in Sheet on that date acknowledging that he had read REP 13075 and understood "all of its radiological instructions, restrictions, and controls." RE (Respondent's Exhibit)-7. Complainant did not ask any questions about REP 13075 or radiation safety either during the first walk-through or a second walk-through with Mr. Elliott on the same day shortly after the first. T. at 282, 286, 287.

At one location during the first walk-through, Complainant asked about a "hot pipe" (a pipe more radioactive than the other fixtures at that location) above which he would be working. Complainant testified that he did not remember Mr. Elliott's answer, and although he remembered he was not satisfied with it, Complainant could not remember whether he told Mr. Elliott of his dissatisfaction. T. at 283-89. Mr. Elliott testified that he asked the HP technician questions about radiation in the areas Complainant would be working for Complainant's benefit, since Mr. Elliott himself knew the answers. T. at 392. Mr. Elliott asked specifically about the "hot pipe" and the HP technician said that in view of the short period of time Complainant would be working there, installing shielding around the pipe would not be in the best interests of the principle of maintaining radiation exposure As Low As Reasonably Achievable (ALARA). T. at 393. Complainant did not ask any questions about safety, T. at 393, only about the work itself. T. at 287.

During the process of leaving containment, Complainant "frisked" himself with a radiation detection device and an alarm sounded. Complainant then asked Mr. Elliott again for a different assignment, but didn't give any specific reason. T. at 297.

An HP technician explained that the alarm was caused by a loose connection; when Complainant frisked himself again with another frisker, no alarm sounded. R.D. and O. at 3.

The next day, January 28, 1986, Complainant was assigned to foreman George Ramirez and, for the first time, asked about the use of respirators in containment. Mr. Ramirez told Complainant that use of respirators would be determined by HP. Complainant asked no further questions about respirators at that time. T. at 479-80.

Later that day, when Complainant and a helper assigned to him, Fernando Lopez, were about to sign in on REP 13075 to enter containment, they questioned whether the REP was appropriate because it did not include welding and did not require respirators. T. at 301, 305. Complainant went to get Mr. Ramirez, who came to the HP sign in location and discussed the matter with the HP technician. Mr. Ramirez learned from this discussion that Complainant and Mr. Lopez had not accurately described to the HP technician the area in which they would be working. The HP technician had the impression that Complainant and Mr. Lopez would be working in an area of much higher levels of radiation. When Mr. Ramirez explained the correct location for their work, the HP technician approved the use of PEP 13075. T. at 486-87. During this discussion, Complainant and Mr. Lopez were standing next to Mr. Ramirez, but Complainant did not ask any questions. T. at 489. Mr. Ramirez thought the matter was resolved. T. at 489. Although Complainant still felt he was being told to perform work, specifically welding and grinding, which was not authorized by REP 13075 and for which he thought a respirator should have been provided, he could not recall whether he expressed these concerns to Mr. Ramirez after the discussion between Mr. Ramirez and the HP

technician. Complainant did not tell any HP personnel or Mr. Ramirez' supervisor about these concerns. T. at 310-311, 325.

Complainant spent the rest of the day, January 28, 1936, assembling the equipment he would need for the job. At the end of the day, Complainant again asked Mr. Ramirez for reassignment, but he did not say why. Complainant was concerned about the radiation contamination level indicated on REP 13076 (a backup REP providing for the use of respirators when indicated by HP smears taken in the work area), but he did not ask Mr. Ramirez or HP about it or about the use of respirators. Complainant had been told during his training that HP would determine if respiratory protection was needed based on a survey of the work area. T. at 258. Mr. Ramirez told Complainant that this was

---

the only job he had for Complainant and that if Complainant refused it, he could be terminated. T. at 312, 492-93.

On the morning of January 29, 1986, Mr. Ramirez asked Complainant if he was going to go into containment. Complainant said he was uncomfortable with the way HP had handled matters on January 27 and 23, 1986, and again asked for a reassignment. Complainant did not explain why he was uncomfortable and Mr. Ramirez said he could not reassign him.[3] Complainant said he would not go into containment and Mr. Ramirez told him to see the general foreman, Ray Thomas. T. at 493-495. When Complainant saw Mr. Thomas, he was asked if he was going into containment. Complainant said no, without explanation. R.D. and O. at 4.[4] Complainant was then terminated for violating project work rule #14, refusal to accept an assignment. *Id.*

I find that to the extent Complainant actually raised safety questions with his supervisors, they were adequately responded to under *Pensyl v. Catalytic. Inc.*, given the general and often ambiguous nature of his questions. To a large degree, Complainant kept his concerns to himself. Complainant understood the function of a Radiation Exposure Permit, signed an acknowledgment that he had read REP No. 13075 and understood it, but did not actually read it and did not ask any questions about it or about radiation safety before the walk-through of January 27, 1986.

When Complainant did ask a more specific question during the walk-through, about the "hot pipe", he could not remember Mr. Elliott's answer and did not tell Mr. Elliott he was not satisfied with it. Mr. Elliott testified that he asked the HP technician about the "hot pipe", and the HP technician explained why erecting shielding around it would not comply with the ALARA principle. Thereafter, during the walk-through Complainant only asked questions about the work, not about safety. When Complainant frisked himself upon leaving containment and the alarm sounded, he said he did not want to work in containment, but did not say why. An HP technician explained why the alarm was spurious, and when Complainant frisked himself with a different instrument, it did not alarm.

The next day, Complainant asked Mr. Ramirez about a special welding hood for use in containment; Complainant said that he had never seen one. Mr. Ramirez told him he did not know if respirators would be needed in containment but if they were, they would be provided by HP. Complainant asked no further questions at that point. When the confusion arose over whether

---

REP 13075 was the correct REP for the work Complainant would be doing, Mr. Ramirez spoke to the HP technician and clarified the location of the work. Complainant was standing next to Mr. Ramirez during that conversation, but again asked no questions. At the end of the day, January 28, 1986, Complainant asked Mr. Ramirez for a reassignment, but did not say why, even though, according to his testimony, he was still concerned about the level of radiation in containment, the confusion about the REP'S, and the use of respirators.

The next day when asked by Mr. Ramirez if he was going into containment, Complainant said no because he was uncomfortable with the way HP had handled matters on January 27th and 28th. Even if Complainant's testimony is credited that he also asked again about the provision of respirators and Mr. Ramirez did not respond, I find that is not sufficient to prove a violation under *Pensyl v. Catalytic*. Complainant's general questions about respirators had been answered several times - that they would be provided if HP found them necessary after a survey of the area when work began. At this point, without being more specific about why he felt his safety would be endangered by entering containment without a respirator, Respondent could reasonably conclude that Complainant's concerns had been adequately responded to and its obligation under *Pensyl v. Catalytic* had been met.

Complainant testified that he believed he was supposed to contact his union steward if he had any safety concerns. T. at 239-240. There is nothing in the record to show that Respondent or anyone else told Complainant that this was the proper procedure to follow. Complainant acknowledged that a document he was given in training, " A Working Guide to San Onofre", CX-C, which he read carefully, T. at 238, explained that safety questions were to be raised first with one's supervisor and then "[i]f you do not feel the question or concern was satisfactorily resolved, you should notify the Chairman of the Onsite Review Committee." The Working Guide also contained a copy of a Nuclear Regulatory Commission (NRC) "Notice to Employees" explaining the right to report safety questions to the NRC onsite inspector or regional office. Complainant also was aware that he could put a note in a "drop box" maintained at several locations for employee safety concerns. R.D. and O. at 5; T. at 246. Complainant did none of these things, although he knew from his training and his conversations with Mr. Elliott and Mr. Ramirez that his job was on the line if he refused the assignment. This is further support for "he finding that Respondent could reasonably have

---

believed it had adequately responded to Complainant's safety concerns. Under the circumstances, Respondent had a legitimate business reason, refusal of a work assignment, to discharge Complainant.

Accordingly, the complaint in this matter is DISMISSED.

SO ORDERED.

ANN MCLAUGLIN
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The Secretary's decisions in ERA cases are binding precedent under the Administrative Procedure Act, (APA) 5 U.S.C. § 551-706 (1982). Section 3 of the APA, 5 U.S.C. § 552(a)(2), provides that "[e]ach agency in accordance with published rules, shall make available for public inspection and copying --

(A) final opinions . . . as well as orders, made in the adjudication of cases;. . . "

Opinions and orders of the Secretary of Labor are available for inspection and copying in the Office of Administrative Appeals in accordance with the Department of Labor's regulations. 29 C.F.R. § 70.12(b) (1936). To the extent applicable on the facts and legal questions presented in a given case, the Secretary's decisions are binding on all Department of Labor administrative law judges., *See Lockert v. Pullman Power Products Corp.* 84-ERA-15 (August 19, 1985).

[2] In a footnote discussing the legislative history of the ERA, R.D. and O. at 6, n.2, the ALJ did not consider the fact that the Senate Report No. 95-848, 95th Cong., 2d Sess. 29, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7303, which he cited, explicitly referred to the employee protection provision of the Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 30 U.S.C. § 801 et seq. (1976), which did not contain explicit coverage for internal safety complaints. See discussion in *Willy v. The Coastal Corporation and Coastal States Management Corporation*, Case No. 85-CAA-1 (June 4, 1987), slip op. at 3-5.

[3] Complainant testified that he asked Mr. Ramirez at this point about the provision of a welder's hood respirator and welding leathers, but Mr. Ramirez did not respond. T. at 328. Mr. Ramirez testified that Complainant's only comments on the morning of January 29, 1936 were that he was uncomfortable with HP. T. at 494.

[4] Although the testimony of Complainant and Mr. Thomas at the hearing was in conflict as to whether Complainant raised safety concerns with Mr. Thomas, the ALJ credited Mr. Thomas' version because of an inconsistent statement in Complainant's deposition. R.D. and O. at 4.